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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1800~~

J. P. STEVENS & CO., INC.,
Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD

AND

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

AND

MILDRED G. BAILEY, ET AL., EMPLOYEES

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF IN CONCURRENCE FOR MILDRED G. BAILEY, ET AL., EMPLOYEES

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This brief is filed by Mildred G. Bailey, et al., Employees,[1] in response to the Company's petition for writ of certiorari. The Employees concur that the writ should issue for reasons hereafter stated. Adopted for purposes of this brief is the material in the Company's petition

[1] 117 employees of the Petitioner's Statesboro, Georgia, plant intervened in the representation portion of the Board hearing, filed their exceptions with the Board and argued in the cour below; hereafter, they are referred to as "Employees."

under the headings, "The Opinions and Judgment in the Court Below and the Decision and Order of the National Labor Relations Board," "Jurisdiction of This Court," "Question Presented," "Statutory Provisions Involved," and "Statement of the Case."

ARGUMENT

I.

THE COURT BELOW MISCONSTRUED THIS COURT'S GISSEL DECISION.

The Fifth Circuit Court misconstrued *Gissel*[2] by holding that majority employee union adherence is no longer necessary to imposition of a bargaining order in a representation dispute. The court below held that if "outrageous" unfair labor practices are present and if their coercive effects could not be eliminated by traditional remedies, then *Gissel* approved entry of a bargaining order "even where the union has never demonstrated majority support in an appropriate unit."[3] Having so ruled, the court continued:

> "We think that the present proceedings constitute one of those 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices which, under *Gissel*, justify the issuance of a bargaining order *despite the absence at one point of a Union-demonstrated majority.*"
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> (12a) (Emphasis added.)

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2 N.L.R.B. v. Gissel Packing Co. 395 U.S. 575, 89 S. Ct. 1918, 23 L. Ed2d 547.

3 Appendix to Petition of J. P. Stevens and Company, Inc. for Writ of Certiorari, at page 8a; hereafter, "(____a)."

and also held:

> "In such an atmosphere the Board was warranted finding that *even if the Union never possessed a vald card majority, a bargaining order was appropriate* to combat Stevens' anti-union conduct." (14a) (Emphasis added.).

Gissel certainly authorizes no such holding. The language of Mr. Elihu Platt, Assistant General Counsel, National Labor Relations Board, is instructive:

> "Prior to *Gissel,* it was Board policy to decline to to issue a bargaining order as a remedy for employer misconduct where the union had not obtained majority status. Some are now suggesting that the Supreme Court in *Gissel* opened the door — although opinions vary as to how wide that door was left ajar — for the Board, in the exercise of its remedial powers, to issue bargaining orders in flagrant situations, where the employer had succeeded in thwarting what might have turned out to be a successful organizing drive. This view, so far rather hestitatingly espoused, would favor issuing a bargaining order without regard to whether the union *ever* had a majority. This com centator, speaking for himself of course, does not agree. The reference (in *Gissel*) to 'the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise' should not be taken out of context. Not even remotely did the Supreme Court intimate that this was its view. . . . (T)he . . . Court was adverting to . . . (a Fourth Circuit discourse) . . . on an obviously hypothetical, if not far-fetched situation, and was not expressing a legal position

> — the issue was not before it. . . . (A)fter the Supreme Court had completed its reference to the hypothetical situation conjured up by the Fourth Circuit and returned to its holding in the cases actually before it — in all of which majority status, had, of course, been achieved — it used the language, where there is also a showing that at one point the union had a majority. This, it is submitted, is wholly consistent with current Board law and suggests no departure."[4]

But the Fifth Circuit has unfortunately made its own departure, albeit an erroneous and critical one. No matter the nature of employer conduct, there still must be some expression of majority worker unit choice of unionization. Asserting a "history" of unfair labor practices, the court below apparently intended to punish the Company and in so doing obliterated the expressed anti-union animus of a *majority* of the Statesboro plant employees, thereby distorting *Gissel*.

The holding of *Gissel* aside, the Act sets out the need for majority union support before imposition of a bargaining order:

> "Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit . . . "[5]

The circuit court's failure to implement the statutory provision (that union representation be founded in majority

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4 Elihu Platt, **The Supreme Court Looks at Bargaining Orders Based on Authorization Cards**, 4 Ga. L. Rev. 796, 797 (1970) (Footnotes omitted.)

5 National Labor Relations Act, Sec. 9(a); 29 U.S.C. Sec. 159 (Emphasis added.)

employee selection) must be reviewed. Otherwise, unionization will be thrust upon a unit of workers, the greater number of whom do not want such representation, and the court will go on misapplying *Gissel* in future "bargaining order" cases.

II.

THE GISSEL DECISION HAS BEEN ERRONEOUSLY APPLIED TO THE CIRCUMSTANCES EXISTING IN THIS CASE.

As argued above, the court's construction of the legal significance of Gissel was wrong on the most vital of issues (representation), but yet to be dealt with is the question: When correctly construed and then applied to the particular circumstances of this case, does *Gissel* authorize entry of a bargaining order? We submit that the answer is "No."

A consideration of this matter must deal with the presence before this Court of 117 employees who do not want to be unionized; by their resistance to the entry of a bargaining order at every stage of this proceeding, these workers have demonstrated the absence of majority union support at the Company's Statesboro, Georgia, plant.[6]

Judge Ainsworth, in a special concurrence with the decision below, states that he is concerned about the imposition of representation on an unwilling majority:

> "Board policy in representation cases favors the holding of elections — in secret — as the most satisfactory and preferred method of ascertaining

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6 99 of the said employees were counted toward a supposed union majority of 52 in a 341 member unit on March 18, 1968; 104 of employees were counted toward a supposed majority of 58 in a 326 member unit on April 20, 1968.

> whether a Union has majority support. . . . It is obvious that such an election is better than the controversial and less reliable card authorization method. It is arguable, however, whether laboratory conditions, insuring fairness and impartiality, could be had in a rerun election. But under all the facts and circumstances here, including the sharp conflict in the evidence and the recantation of a large number of employees of the cards they signed, such an election could be the best solution here. Then the troublesome question of whether the Board is imposing a minority union on a majority of the Company's employees could be settled."[7]

Regrettably, the justice concurs in enforcement of the Board order, and cites *Gissel*. Contrariwise, it is submitted that *Gissel* requires no such noxious result as having union representation cast on an averse majority of workers. Rather, this Court expressed its concern for employee choice, saying,

> "The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should re-emphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehaviour. In fashioning a remedy in the exercise of its discretion, then the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in

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7 Appendix of Petitioner's Brief at pages 31a, 32a.

> the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."[8]

The lower court has concerned itself with remedial orders against the Company, without balancing the scales with recognition that in acting against the Company, it is also penalizing the blameless employees who do not want to be represented by a union, employer acts notwithstanding. Equitable consideration of the contending policies requires a real regard for "employee sentiment." The three barometers of that sentiment in the present case are the cards signed, the votes cast, and the presence here of the respondent employees.

The union lost the election almost 2 to 1, and the respondents' appearance evidences a majority anti-organization animus. Only the cards could possibly evidence union majority strength in the unit. But the cards were obtained from employees, all of whom live in an agrarian community, most of whom are totally unversed in the nature of unionization, and many of whom are illiterate. There is immense and often repeated testimony (by 92 employees) generally to the effect that the cards were signed upon the representation that they would be used to get an election, not to bring a union into the plant. These circumstances certainly demand a solution other than entry of a bargaining order.

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8 N.L.R.B. v. Gissel Packing Co., supra at 614, 5.

The interest of these respondents must be considered — employee wishes must be protected. The entry of comprehensive cease and desist orders and the holding of a second election would, once and for all, bring an equitable solution to this dilemma.

CONCLUSION

The Employees respectfully submit that the petition for certiorari should be granted.

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June, 1971